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GENERAL AVIATION ACCIDENT LIABILITY STANDARDS: WHY THE FUSS?

GREGORY P. WELLS

A JOKE PRESENTLY making the rounds in the general aviation industry is that if the airplane flown by the Wright brothers at Kitty Hawk was still flying today, Orville and Wilbur would still be responsible for it under today's general aviation product liability laws.¹ This attempt at humor is indicative of the current state of the general aviation industry. Since the industry's boom times in the late 1970s, general aircraft delivery has dropped from 18,000 units delivered in 1978 to 1143 units delivered in 1988.²

Although not entirely to blame, a fair share of this decline is attributable to the increase in the cost of accident liability insurance.³ Industry wide liability insurance costs in 1985 were \$210 million, an increase of almost nine

¹ Bradley, *Aircraft Manufacturers Hope Congress Faces Product Liability Issue*, *Wichita Bus. J.*, Aug. 28, 1989, at 13, col. 1.

² *Id.* at 16, col. 3.

³ *Hearings on H.R. 1307 Before the Subcomm. on Aviation of the Comm. on Public Works and Transp.*, 101st Cong., 1st Sess. 71-75 (1989) (statement of Jan K. VonFlatern, General Counsel, Piper Aircraft Corporation) [hereinafter Statement of VonFlatern]. *But see Hearings on S. 473 Before the Subcomm. on Aviation of the Comm. on Commerce, Science and Transp.*, 100th Cong., 1st Sess. 92-94 (1987) (statement of the Association of Trial Lawyers of America) [hereinafter Statement of AOTLA 1987]. S. 473 was introduced in the 100th Congress and was virtually identical to S. 640 and H.R. 1307 introduced in the 101st Congress. S. 473, 100th Cong., 1st Sess., 133 CONG. REC. 2911 (1987). "The decline in the demand for general aviation aircraft, we believe, is unrelated to product liability law. Overproduction in the 1970's, the long useful life of aircraft, the very healthy used plane market and subsidized foreign competition are the real causes of the industry's sales problems." Statement of AOTLA 1987, *supra*, at 94.

times over the 1978 costs.⁴ This increase in liability insurance⁵ has completely driven some manufacturers from the market,⁶ while others have dropped liability insurance altogether, opting for self insurance.⁷ Still others are forced to carry only an excess liability policy.⁸

In an effort to alleviate this problem, both houses of Congress introduced bills in the 101st Congress to provide uniform liability standards for general aviation accidents.⁹ Senate Bill 640 was introduced by Senator

⁴ Bradley, *supra* note 1, at 16, col. 4. Liability claims pending against Beech Aircraft alone increased from \$447 million as of January 1, 1984, to over \$1.1 billion pending in 1987. *Hearings on S. 473 Before the Subcomm. on Aviation of the Comm. on Commerce, Science and Transp.*, 100th Cong., 1st Sess. 54 (1987) (statement of Robert Martin, Martin, Pringle, Oliver, Triplett and Wallace) [hereinafter Statement of Martin].

⁵ Beech Aircraft estimates that its cost for insurance per unit delivered is \$80,000. This does not include the cost of insurance incurred by manufacturers of components included in the cost of the component delivered to Beech, which is estimated to be an additional \$25,000 per unit delivered. Statement of Martin, *supra* note 4. Russ Meyer, Chairman of Cessna Aircraft estimates that the cost of liability insurance on an \$80,000 airplane would be between \$40,000 and \$50,000. Bradley, *Cessna's Skies Turning Blue After Poor '80s*, *Wichita Bus. J.*, Aug. 21, 1989, at 24, col. 3.

⁶ Cessna Aircraft Company once bragged of "teaching the world to fly." Today it no longer manufactures single-engine, piston aircraft, largely due to the cost of liability insurance. According to Russ Meyer, Chairman of Cessna, "[w]e'd like nothing better [than to re-enter the piston driven general aviation market], but if nothing changes with respect to product liability costs, it is unlikely that we will build the piston airplanes." Cessna now concentrates on the business jet market. Bradley, *supra* note 5, at 1, col. 4, and at 24, col. 3.

⁷ When Stuart Millar purchased Piper Aircraft in May 1987, one of the first things he did was drop liability insurance. *Against the Law*, *The Economist*, June 10, 1989, at 66. Piper now fights every claim considered unjustified with a team of lawyers that has been described as having the disposition of a "junkyard" dog. *Id.* If Piper is hit with a massive liability judgment, Mr. Millar has resigned himself to turning the keys to the company over to the winner. *Piper May Still Be Carrying Excess Baggage*, *Bus. Week*, June 12, 1989, at 76.

⁸ Beech Aircraft has what amounts to a \$50 million deductible for product liability claims. Bradley, *supra* note 1, at 16, col. 4. General liability insurance covers the insured for claims up to its policy limit. Most general liability policies include a deductible for a specified amount of liability for which the insured is itself responsible. Excess liability coverage is a separate policy which covers the insured for claims in excess of the general liability policy limits. Self insurance consists of the insured insuring itself for claims up to a certain amount, usually significantly higher than a typical deductible. Often self insurance and excess liability coverage work together to protect an insured. See generally C. KULP & J. HALL, *CASUALTY INSURANCE* (1968).

⁹ Similar bills were introduced in two prior sessions of Congress. Bradley, *supra*

Kassebaum¹⁰ on March 16, 1989, while House Bill 1307 (the Act) was introduced by Representative Glickman¹¹ on March 8, 1989.¹² The stated purpose of this legislation is to "establish rules of Federal law for determining personal injury and property damage arising out of general aviation accidents."¹³

This comment will analyze and discuss the impact the Act will have on existing law in the area of general aviation accidents.

I. OVERVIEW OF THE ACT

The scope of the Act is limited exclusively to accidents involving general aviation aircraft.¹⁴ The Act defines general aviation aircraft as aircraft which have a maximum seating capacity of less than 20 people and are not currently used in scheduled passenger carrying operations.¹⁵

note 1, at 13, col. 1. In the 100th Congress, the Senate bill went as far as the floor of the Senate before it was killed by filibuster, while the House bill was killed in committee. *Id.* at 16, col. 3.

¹⁰ Republican, Kansas.

¹¹ Democrat, Kansas.

¹² S. 640, 101st Cong., 1st Sess. (1989); H.R. 1307, 101st Cong., 1st Sess., (1989). The bills are virtually identical. This comment will focus on H.R. 1307, with any material differences between the two noted as necessary. The Product Liability Reform Act, S. 1400, was also introduced during the 101st Congress. S. 1400 modifies product liability rules for all types of products, not only general aviation aircraft. S. 1400 differs from H.R. 1307 and S. 640 in three material respects: (1) everyone in the chain of causation is severally liable, no one is jointly liable; (2) a twenty-five year statute of repose only applies if the injured party is eligible under worker compensation rules; and (3) punitive damages against the manufacturer are generally not allowed in aviation accidents if the aircraft was FAA certified. S. 1400, 101st Cong., 2nd Sess., 135 CONG. REC. 8725 (1989).

¹³ H.R. 1307, *supra* note 12, § 2(b). The congressional findings included in the bill set out several major reasons why Congress believes the legislation is necessary. Specifically, (1) air transportation is an important component of the nation's transportation system; (2) the air transportation industry is highly regulated; (3) general aviation manufacturers and component part manufacturers are ceasing production due to increasing liability costs; and (4) while the number of injuries has declined, the amount of damages paid out in liability claims has increased tremendously. *Id.* § 2(a).

¹⁴ *Id.* § 721(a).

¹⁵ *Id.* § 732(3).

[T]he term 'general aviation aircraft' means any aircraft for which a type certificate or any airworthiness certificate has been issued by the Administrator, which, at the time such certificate was originally is-

Since the Act is limited to general aviation aircraft, it will not impact liability arising from commercial air carrier accidents.

Furthermore, the Act will not exclude from liability any party potentially liable under current law. The Act applies to general aviation manufacturers, owners and operators of general aviation aircraft, or anyone that repairs, maintains, or provides any other support services for general aviation aircraft.¹⁶ A general aviation manufacturer is a manufacturer of the airframe or engine used in a general aviation aircraft or the manufacturer of any system, component, subassembly, or other part of a general aviation aircraft.¹⁷

The Act sets out three broad standards on which liability may be premised: (1) negligence, (2) strict products liability, and (3) warranty.¹⁸ The negligence standard established by the Act is simply common law negligence. The Act provides that any person injured in a general aviation accident by the negligence of another, as long as the negligence is the proximate cause of the injury, may bring

sued, had a maximum seating capacity of fewer than 20 passengers, and which is not, at the time of the accident, engaged in scheduled passenger carrying operations as defined in regulations issued under [the Federal Aviation Act of 1958].

Id.

¹⁶ *Id.* § 721(a).

The provisions of this subtitle shall apply to any action for damages for harm arising out of a general aviation accident brought against a general aviation manufacturer, the owner or operator of a general aviation aircraft, a person who repairs, maintains, or provides any other support for a general aviation aircraft, or any other person or governmental entity.

Id. The senate bill includes actions brought by occupants at the time of a general aviation accident and nonoccupants that are bringing an action on behalf of such occupants. S. 640, *supra* note 12, § 4(e).

¹⁷ H.R. 1307, *supra* note 12, § 732(4). "[T]he term 'general aviation manufacturer' means —

(A) the builder or manufacturer of the airframe of a general aviation aircraft;
(B) the manufacturer of the engine of a general aviation aircraft; and
(C) the manufacturer of any system, component, subassembly, or other part of a general aviation aircraft." *Id.*

¹⁸ *Id.* § 722.

an action for liability.¹⁹

Within the area of strict products liability, the Act makes two major changes to existing law. First, in order to hold a person liable for manufacturing or design defects, the product must have been defective at the time the product left the control of the manufacturer, as judged against the reasonably feasible design and engineering standards which existed at the time of manufacture.²⁰ Second, the product must be used in a manner for which it was designed and manufactured.²¹ This second change precludes liability in situations where the aircraft was used in a manner for which it was not designed or manufactured, eliminating what is commonly known as the "crashworthiness" doctrine. The Act also codifies the requirements that a manufacturer warn consumers about dangers the manufacturer is aware of or reasonably should be aware of, either at the time of the sale or after the product is sold.²²

Finally, the Act also provides for liability in situations where an injury arises from a breach of an express warranty.²³

Other major provisions of the Act include the following: (1) establishing comparative liability in all general aviation accidents; (2) limiting the length of time, after the manufacture of the aircraft, in which an injured person can bring suit; (3) limiting the admissibility of evidence of any corrective measures made by the manufacturer which, if made before the accident, might have prevented the accident; (4) allowing punitive damages only in situations where the actions of the responsible party constituted a conscious and flagrant indifference for the safety of users of general aviation aircraft; and (5) placing concurrent jurisdiction of general aviation accidents with federal and

¹⁹ H.R. REP. NO. 218, 101st Cong., 1st Sess., pt. 1, at 6 (1989).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

state courts.²⁴

Not surprisingly, manufacturers are in support of the Act.²⁵ Perhaps a little surprising is the fact that two consumer organizations, whose members stand to be injured by any limitations on liability, are also in support of the Act. These organizations are the Aircraft Owners and Pilots Association (AOPA) with over 280,000 members,²⁶ and the National Business Aircraft Association (NBAA) with over 2900 member companies.²⁷ Both AOPA and NBAA support the legislation because of their belief that it will decrease the cost of liability insurance coverage carried by manufacturers, which will, in turn, decrease the cost of aircraft and thus decrease the cost of flying to their members.²⁸

The strongest opposition to the Act comes from a seemingly unlikely opponent, the Association of Trial Lawyers of America (AOTLA).²⁹ AOTLA bases its oppo-

²⁴ *Id.* at 6-7.

²⁵ Eberhart, *Suits May Ground Small-Craft Makers: Air Accident Liability Limits Sought*, Kansas City, Mo. Star, July 5, 1989, at 2C, col. 6; see also Statement of VonFlatern, *supra* note 3, at 71-75 (statement in support of the Act), and Statement of Martin, *supra* note 4, at 54 (statement in support of the Act).

²⁶ Eberhart, *supra* note 25, at 2C, col. 5; see also *Hearings on H.R. 1307 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transp.*, 101st Cong., 1st Sess. 85 (1989) (statement of John S. Yodice, General Counsel, Aircraft Owners and Pilots Association, in support of the Act) [hereinafter Statement of Yodice].

²⁷ *Hearings on S. 473 Before the Subcomm. on Aviation of the Comm. on Commerce, Science and Transportation*, 100th Cong., 1st Sess. 100 (1987) (statement of the National Business Aircraft Association, Inc.) [hereinafter Statement of NBAA].

²⁸ Statement of Yodice, *supra* note 26, at 85; Statement of NBAA, *supra* note 27, at 100. The AOPA recognizes that its position in support of the Act is in dichotomy with the normal position that a consumer group advocates in this kind of situation.

On the one hand, we are the probable victims of any air crashes which are due to defective general aviation products. . . . On the other hand, we have an interest in the availability, at reasonable cost, of general aviation products. It is apparent to us that many manufacturers and suppliers have curtailed production and others have gotten out of the general aviation business altogether, principally due to product liability concerns.

Statement of Yodice, *supra* note 26, at 85.

²⁹ See generally *Hearings on S. 640 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science and Transp.*, 101st Cong., 1st Sess. 65-75 (1989) (statement of Charles T. Hvass, Jr. of the Association of Trial Lawyers of America, in opposition

sition to the Act on several grounds: (1) the fact that tort reform historically has been a matter of state concern;³⁰ (2) any incentive to improve aircraft crashworthiness is eliminated;³¹ (3) by establishing a statute of repose, manufacturers will be able to avoid liability in situations where their actions were clearly negligent;³² (4) the injection of negligence standards into strict liability;³³ and, (5) the introduction of comparative negligence will prevent innocent victims from receiving full compensation.³⁴

II. LIABILITY STANDARDS

A. Negligence

The Act provides for recovery in a general aviation accident to an injured party if the injury is caused by the negligence of another and the negligence is the proximate cause of the injury.³⁵ This negligence standard is the

to the Act) [hereinafter Statement of AOTLA 1989]; Statement of AOTLA 1987, *supra* note 3, at 92-94 (statement in opposition to the Act).

³⁰ Statement of AOTLA 1989, *supra* note 29, at 65.

³¹ *Id.* at 68. Manufacturers will be able to argue that the aircraft was not being used for its intended purpose when it crashed and thus avoid liability. *Id.*

³² *Id.* at 69-72. For instance, the FAA certified the Cessna 411, a twin engine aircraft, as being airworthy, although it did not actually meet certification requirements. The Act would allow Cessna to escape liability if the fact that the aircraft failed certification was not discovered within the time allowed by the statute of repose. *Id.* Every operating civilian aircraft must have an airworthiness certificate issued by the FAA. 49 U.S.C. app. §§ 1423(c), 1430 (1988). See generally 14 C.F.R. § 23 (1990) (airworthiness standards for normal, utility, acrobatic and commuter airplanes).

³³ *Id.* at 70. A plaintiff would have to show not only that the aircraft was unreasonably dangerous, but also that a reasonable manufacturer would have built or designed the aircraft differently. *Id.*

³⁴ *Id.* at 72-73. The abolition of joint and several liability will make collection of damages by the victim extremely difficult. One party liable for damages may have gone out of business or may not be subject to judgment. The joint and several liability provisions of the Act will make it impossible to collect 100% of the judgment from any tortfeasor not completely at fault (unless the harm is due to a component part, in which situations the manufacturer of the airframe is jointly and severally liable with the manufacturer of the component), thus reducing the victim's recovery in situations where a joint tortfeasor is unable to pay. *Id.*

³⁵ H.R. 1307, *supra* note 12, § 722(a). "Any person claiming damages from harm arising out of a general aviation accident may bring an action for damages against a party and may recover damages from that party if that party was negligent and such negligence is a proximate cause of the claimant's harm." *Id.*

same standard applied in products liability actions in general, and is also the same standard currently utilized in aviation cases.³⁶

To prove negligence in an aviation case, the plaintiff must show that the defendant owed a duty to the plaintiff, the defendant breached this duty, and the defendant's breach proximately caused an injury to the plaintiff.³⁷ The breach may occur during the manufacture³⁸ or design of the aircraft.³⁹ As in other products liability negligence actions, privity between the manufacturer and the injured claimant is not required.⁴⁰

³⁶ Haskell, *Products Liability—An Update For The Defendant*, 1973 A.B.A. SEC. INS., NEGL. & COMPENSATION L. 87.

³⁷ *Id.*

³⁸ *Carter Carburetor Corp. v. Riley*, 186 F.2d 148 (8th Cir. 1951) (negligent manufacture of aircraft fuel pump); see also RESTATEMENT (SECOND) OF TORTS § 395 (1964).

A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.

Id.

³⁹ *Moorhead v. Mitsubishi Aircraft Int'l, Inc.*, 828 F.2d 278 (5th Cir. 1987) (negligent design of an airspeed indicator); *Manos v. Trans World Airlines, Inc.*, 324 F. Supp. 470 (N.D. Ill. 1971) (negligent design of a thrust reverser system); see also RESTATEMENT (SECOND) OF TORTS § 398 (1964).

A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

Id.

⁴⁰ *Vrooman v. Beech Aircraft Corp.*, 183 F.2d 479 (10th Cir. 1950) (foreseeability of the consequences creates the duty); *Middleton v. United Aircraft Corp.*, 204 F. Supp. 856 (S.D.N.Y. 1960). A person without direct contractual relations to the manufacturer can recover for his negligence. The manufacturer should realize that in the ordinary course of events, persons other than the buyer will share the danger. *Id.* at 858. Since 1916, courts have used a foreseeability test. If the injury to the plaintiff was foreseeable, privity of contract between the plaintiff and the defendant is not necessary. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

A classic example of negligence in an aviation case is found in *Northwest Airlines v. Glenn L. Martin Co.*⁴¹ In *Northwest Airlines*, a commercial airliner crashed as it approached Minneapolis, Minnesota during a thunderstorm.⁴² The subsequent investigation revealed that a wing spar, broken because of metal fatigue, caused the aircraft to crash.⁴³ The airline brought an action against the manufacturer for negligent design and manufacture in the construction of the aircraft.⁴⁴ The airline alleged that negligent design and construction of the wing spars made them unreasonably susceptible to metal fatigue and claimed that if the manufacturer had exercised due care, the accident would not have occurred.⁴⁵ The Sixth Circuit held that the evidence presented a question of negligence which was properly submitted to the jury.⁴⁶ The case, however, was ultimately remanded due to improper jury instructions regarding contributory negligence.⁴⁷

A manufacturer may also be liable for negligence in connection with the use of a component manufactured by someone else.⁴⁸ In *Boeing Airplane Co. v. Brown*,⁴⁹ an action for negligence was brought against the manufacturer of the aircraft.⁵⁰ The cause of the accident was the failure of a component part manufactured by another party.⁵¹ The

⁴¹ 224 F.2d 120 (6th Cir. 1955), *cert. denied*, 350 U.S. 937 (1956).

⁴² *Id.* at 122-23.

⁴³ *Id.* at 123.

⁴⁴ *Id.* at 121. "From this thick overlay of factual controversy emerge familiar questions of ordinary care, proximate cause . . ." *Id.* at 122.

⁴⁵ *Id.* at 124.

⁴⁶ *Id.* "The effect of the voluminous evidence was certainly to leave the question of Martin's lack of ordinary care in a state upon which reasonable minds could differ." *Id.*

⁴⁷ *Id.* at 131.

⁴⁸ RESTATEMENT (SECOND) OF TORTS § 395 comment g (1964). "[A] manufacturer who incorporates a part made by another manufacturer into his finished product should exercise reasonable care to ascertain not only the material out of which the part is made but also the plan under which it is made." *Id.*

⁴⁹ 291 F.2d 310 (9th Cir. 1961).

⁵⁰ *Id.*

⁵¹ *Id.* at 312. The accident was caused by the explosion of an alternator, one of four used to provide electricity to the aircraft. *Id.*

court held that it was irrelevant that the part causing the accident was not manufactured by the manufacturer of the aircraft.⁵² The manufacturer "[is] chargeable with the duty to exercise reasonable care in the design and construction of the component . . . which is installed in its manufactured product."⁵³

In an effort to reduce the plaintiff's burden of proof on negligence issues, some courts have allowed the use of the doctrine of *res ipsa loquitur* (*res ipsa*).⁵⁴ *Res ipsa* may be used in some situations to draw the inference that the manufacturer was negligent in the manufacture of the aircraft.⁵⁵ Before a plaintiff may use *res ipsa*, he must show: (1) that the alleged defect existed at the time the aircraft left the control of the manufacturer; (2) the defect would not ordinarily occur in the absence of negligence; and (3) the accident was not the result of the conduct of the plaintiff.⁵⁶ The inherent difficulty in satisfying the first element of *res ipsa* proves to be the biggest obstacle for many plaintiffs.⁵⁷ Proving that the defect existed at the time the air-

⁵² *Id.* at 313.

If Thompson [the manufacturer of the component] failed to exercise reasonable care in the design and manufacture of that component, or if Thompson or Boeing [the manufacturer of the aircraft] or both failed to exercise reasonable care in inspecting or testing the component, or if Boeing failed to exercise reasonable care in installing the component in the B-52 bomber or in warning the Air Force of any known defect therein, Boeing is liable for damage proximately caused thereby.

Id.

⁵³ *Id.*

⁵⁴ *North American Aviation, Inc. v. Hughes*, 247 F.2d 517 (9th Cir. 1957), *cert. denied*, 355 U.S. 914 (1958) (*res ipsa* used in a negligence action for an unknown defect in aircraft); *Becker v. American Airlines, Inc.*, 200 F. Supp. 839 (S.D.N.Y. 1961) (*res ipsa* used in negligence action for defective altimeters).

⁵⁵ RESTATEMENT (SECOND) OF TORTS § 328D (1964).

⁵⁶ *Tompkins v. Northwestern Union Trust Co.*, 198 Mont. 170, 176-77, 645 P.2d 402, 406 (1982).

⁵⁷ Podhurst, *Duties of Manufacturers and Reassemblers: Plaintiffs' Positions*, 1973 A.B.A. SEC. INS., NEGL. & COMPENSATION L. 178. "[T]he 'control' required to be shown is simply 'control' at the time the problem or shortcoming arose." *Id.*; see also *Becker*, 200 F. Supp. at 843. *But cf.* *Webb v. Zurich Ins. Co.*, 194 So. 2d 436 (La. Ct. App. 1966) (use of *res ipsa* denied when aircraft was airworthy when delivered), *rev'd on other grounds*, 251 La. 558, 205 So. 2d 398 (1967).

craft or component left the control of the manufacturer remains a significant burden.

The negligence standard set out in the Act makes no changes to the rules of negligence as they currently exist. Therefore, the negligence rules discussed above would continue unaffected if the Act becomes law.

B. *Strict Liability*

The Act also provides for recovery under a theory of strict liability in tort.⁵⁸ This section of the Act contains two of the more controversial changes to the existing law. The first is the allowance of a "state of the art" defense.⁵⁹ The other is the limitation of liability to only those situations where the aircraft was being used in the manner for which it was designed and manufactured.⁶⁰

The doctrine of strict liability was created to allow a plaintiff to recover against a manufacturer for a defective product without proving that the manufacturer engaged in culpable conduct.⁶¹ Today a majority of jurisdictions in the United States have adopted strict liability in tort.⁶² The doctrine of strict liability is embodied in Section 402A of the Restatement (Second) of Torts.⁶³

⁵⁸ H.R. 1307, *supra* note 12, § 722(b).

Any person claiming damages for harm arising out of a general aviation accident may bring an action for damages against a general aviation manufacturer of a product and may recover damages from that general aviation manufacturer if -

(A) the product, when it left the control of the manufacturer, was in a defective condition unreasonably dangerous for its intended purpose, according to engineering and manufacturing practices which were reasonably feasible;

(B) the defective condition is a proximate cause of the claimant's harm; and

(C) the general aviation aircraft was being used at the time of the accident for a purpose and in a manner for which it was designed and manufactured.

Id.

⁵⁹ *Id.* § 722(b)(1)(A).

⁶⁰ *Id.* § 722(b)(1)(C).

⁶¹ AMERICAN LAW OF PRODUCTS LIABILITY § 16:4 (3d ed. 1987).

⁶² L. KREINDLER, AVIATION ACCIDENT LAW § 7.04[1] (rev. ed. 1990).

⁶³ RESTATEMENT (SECOND) OF TORTS § 402A (1964). "One who sells any prod-

In order to recover under current strict liability standards, the plaintiff bears the burden of showing the following: (1) the product was defective; (2) the defect existed at the time the product left the control of the manufacturer; (3) the defect was not contemplated by the user; (4) the defect made the product unreasonably dangerous; and (5) the injury to the plaintiff was caused by the defect.⁶⁴ A product may be defective as the result of a manufacturing defect or a design defect.⁶⁵ As in negligence cases, privity between the manufacturer and the user is not required.⁶⁶

Modern courts have spent a lot of time attempting to define the phrase "defective condition unreasonably dangerous" found in Section 402A.⁶⁷ Some jurisdictions hold that the two parts of the phrase, "defective condition" and "unreasonably dangerous," are synonymous.⁶⁸ Others believe that the two phrases establish two standards of proof: (1) the product is defective, and (2) the defect constitutes an unreasonable danger.⁶⁹

The initial approach adopted by a majority of the courts in determining the meaning of a "defective condition unreasonably dangerous" was a consumer expectation test

uct in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property" *Id.*

⁶⁴ *Manos*, 324 F. Supp. at 484; *see also* *Rigby v. Beech Aircraft Co.*, 548 F.2d 288 (10th Cir. 1977).

⁶⁵ *See, e.g.,* *Meil v. Piper Aircraft Corp.*, 658 F.2d 787 (10th Cir. 1981) (design defect in seatbelt, fuel supply system, and fire extinguisher holder); *O'Keefe v. Boeing Co.*, 335 F. Supp. 1104 (S.D.N.Y. 1971) (manufacturing defect in weld); *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 577 P.2d 1322 (1978) (design defect in engine carburetor); *see also* AMERICAN LAW OF PRODUCTS LIABILITY § 17:3 (3d ed. 1987).

⁶⁶ *Manos*, 324 F. Supp. at 483.

⁶⁷ W. TURLEY, AVIATION LITIGATION § 1.04 (1986).

⁶⁸ *Id.*; *see also* *Ross v. Up-Right, Inc.*, 402 F.2d 943 (5th Cir. 1968) (only requires unreasonably dangerous); *Glass v. Ford Motor Co.*, 123 N.J. Super. 599, 304 A.2d 562 (Law Div. 1973) (product only required to be defective).

⁶⁹ W. TURLEY, *supra*, note 67, § 1.04; *see also* *Bruce v. Martin-Marietta Corp.*, 544 F.2d 442, 447 (10th Cir. 1976); *Kleve v. General Motors Corp.*, 210 N.W.2d 568, 570-71 (Iowa 1973).

set out in the comment to the Restatement.⁷⁰ Under this test, a defective condition is defined as a "condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."⁷¹ "Unreasonably dangerous" is defined as "[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it"⁷²

The Superior Court of Pennsylvania applied the consumer expectation test in *Berkebile v. Brantly Helicopter Corp.*,⁷³ to determine whether a defect in a helicopter which prevented the pilot from using autorotation in case of engine failure was an unreasonably dangerous defective condition.⁷⁴ The court held that the ordinary consumer would expect that in the case of engine failure, the pilot of the helicopter would have enough time to place the helicopter in autorotation in order to land without crashing.⁷⁵ Since the design of the helicopter did not allow the use of autorotation as quickly as consumers would expect it to, this constituted an unreasonably dangerous defective condition.⁷⁶

The risk-utility test, originally adopted in the California case *Barker v. Lull Engineering Co.*⁷⁷ is another frequently used test to determine what constitutes an unreasonably dangerous defective product.⁷⁸ This test considers whether the risk of harm from the product in its defective condition outweighs its utility. Factors considered by a court when weighing the risk versus the utility of the product include (1) the gravity of the danger; (2) the like-

⁷⁰ W. TURLEY, *supra* note 67, § 1.07.

⁷¹ RESTATEMENT (SECOND) OF TORTS § 402A comment g (1964).

⁷² *Id.* comment i.

⁷³ 219 Pa. Super. 479, 281 A.2d 707 (1971).

⁷⁴ *Id.* at 479, 281 A.2d at 709. Autorotation consists of allowing the rotor blades to rotate free of the engine, combined with the pitch of the helicopter, creating enough lift to glide to a landing. W. TURLEY, *supra* note 67, § 3.02.

⁷⁵ *Berkebile*, 219 Pa. Super. at 479, 281 A.2d at 709.

⁷⁶ *Id.*; see also *Bruce*, 544 F.2d at 442 (consumer expectation test used to determine whether design of seats was an unreasonably dangerous defective condition).

⁷⁷ 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

⁷⁸ *Id.* at 431-32, 573 P.2d at 455, 143 Cal. Rptr. at 237.

likelihood of the danger; (3) the cost and feasibility of a safer design; and (4), the adverse consequences of adopting the safer design.⁷⁹

In *Wilson v. Piper Aircraft Corp.*,⁸⁰ the Supreme Court of Oregon applied the risk-utility test to determine whether a carburetor which iced up upon entering a cloud was an unreasonably dangerous defect.⁸¹ The court realized that, in some situations, the remote probability of injury resulting from the design is outweighed by the utility of the product in the defective condition. As a result, the court held that the manufacturer was not responsible for any injury arising from the defect.⁸² The court also recognized that in certain situations a change in design which increases safety might nevertheless render the product's utility worthless. Under those situations, the manufacturer would likewise not be liable.⁸³ The court ultimately reversed and remanded the case because there was no evidence of a safer alternative design which could support the lower court's finding against the manufacturer under a risk-utility theory.⁸⁴

A minority of jurisdictions follow the pro-plaintiff California rule as set out in *Cronin v. J.B.E. Olson Corp.*⁸⁵ The *Cronin* rule provides that a plaintiff is only required to show a defective condition proximately causing an injury.⁸⁶ The plaintiff is not required to show that the defect made the product unreasonably dangerous.⁸⁷ The *Cronin* court was concerned that proof of an unreasonably dangerous defect injects principles of negligence into

⁷⁹ W. TURLEY, *supra* note 67, § 1.09.

⁸⁰ 282 Or. 61, 577 P.2d 1322 (1987).

⁸¹ *Id.*

⁸² 282 Or. at 61, 577 P.2d at 1325. "The manner of injury may be so fortuitous and the chances of injury occurring so remote that it is reasonable to sell the product despite the danger." *Id.* (citation omitted).

⁸³ *Id.*

⁸⁴ *Id.* at 61, 577 P.2d at 1327-28.

⁸⁵ 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

⁸⁶ *Id.* at 132-36, 501 P.2d at 1162, 104 Cal. Rptr. at 442-43.

⁸⁷ *Id.*

strict liability.⁸⁸

The introduction of "state of the art" into strict liability analysis under the Act provides an absolute defense for determining an unreasonably dangerous defective condition under the consumer expectation test and the risk-utility test.⁸⁹

Since a consumer can expect no more than "state of the art" at any given time, "state of the art" will always meet the consumer expectation test.⁹⁰ A similar result is reached under the risk-utility test. When analyzing a defect under risk-utility, some courts consider whether any feasible, safer, alternatives exist.⁹¹ The term "state of the art" implies that the technique employed is the best way, currently feasible, to accomplish the desired result. If that is the case, there are no better alternatives. Thus, a manufacturer who can show that the method used was "state of the art" at the time the aircraft was manufactured will also satisfy the risk-utility test and avoid liability.⁹²

There is already considerable controversy surrounding the injection of the "state of the art" defense into strict liability.⁹³ The controversy stems from the fact that "state of the art" injects negligence principles into strict liability,

⁸⁸ *Id.* at 132, 501 P.2d at 1162, 104 Cal. Rptr. at 442. Requiring the plaintiff to prove an unreasonably dangerous defect "has burdened the plaintiff with an element that rings of negligence." *Id.*; see also *McGee v. Cessna Aircraft Co.*, 82 Cal. App. 3d 1005, 147 Cal. Rptr. 694 (1978) (application of *Cronin* in an aviation liability case).

⁸⁹ H.R. 1307, *supra* note 12, § 722(b)(1)(A).

⁹⁰ "State of the art" can never be a defense in a manufacturing defect case because a manufacturing defect is a mistake made in the manufacturing process.

⁹¹ See *supra* notes 77-90 and accompanying text.

⁹² The "state of the art" defense does not need to be considered under the *Cronin* theory discussed earlier. The Act specifically provides that the product be "in a defective condition unreasonably dangerous" (the same standard as established in § 402A of the Restatement (Second) of Torts). Thus a court would be precluded from using the *Cronin* standard that a plaintiff merely has to show the product was defective and proximately caused the injury and not that the defect rendered the product unreasonably dangerous.

⁹³ See Robb, *A Practical Approach to Use of State of The Art Evidence in Strict Products Liability Cases*, 77 Nw. U.L. Rev. 1, 9-13 (1982). The majority of the jurisdictions in the United States allow the admission of "state of the art" evidence as a factor to be considered in strict liability cases. W. TURLEY, *supra* note 67, § 2.15.

where the primary concern is not the amount of care exercised by the manufacturer but merely whether the product is defective.⁹⁴

In *Bruce v. Martin-Marietta Corp.*,⁹⁵ the Tenth Circuit considered the "state of the art" defense in connection with the use of the consumer expectation test.⁹⁶ The case arose from the crash of an aircraft that was eighteen years old.⁹⁷ During the crash, seats broke loose from the floor and blocked the exit.⁹⁸ A fire then broke out.⁹⁹ A plaintiff's expert testified at trial that, at the time of the crash, there were seats in use in some aircraft that would not have broken loose and blocked the exit.¹⁰⁰ The defense countered with evidence that the seats were "state of the art" technology as it existed in the year the aircraft was manufactured.¹⁰¹ The court held that the "state of the art" evidence helped determine the expectation of the consumer and since the plaintiff failed to present any contrary evidence as to the consumer's expectation, the "state of the art" evidence was properly admitted and considered by the trial court in granting summary judgment for the manufacturer.¹⁰²

The Act contemplates another major change to existing law under the doctrine of strict liability. The Act provides that before a manufacturer can be held responsible for an accident caused by a defective aircraft, the aircraft must

⁹⁴ Robb, *supra* note 93, at 9-13.

⁹⁵ 544 F.2d 442 (10th Cir. 1976).

⁹⁶ *Id.* "State of the art" has also been considered under a risk-utility test. See *McLaughlin v. Sikorsky Aircraft*, 148 Cal. App. 3d 203, 195 Cal. Rptr. 764 (1983). The court considered that among the relevant factors in applying the risk-utility test is whether any feasible alternatives exist. *Id.* at 210, 195 Cal. Rptr. at 767. To determine whether any feasible alternatives exist, it seems reasonable that evidence as to whether the design was "state of the art" would be relevant. *Id.* at 210, 195 Cal. Rptr. 767.

⁹⁷ *Martin-Marietta*, 544 F.2d at 444.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 446.

¹⁰¹ *Id.*

¹⁰² *Id.* at 447. "A consumer would not expect a Model T to have the safety features which are incorporated in automobiles made today. The same expectation applies to airplanes." *Id.*

have been in use "at the time of the accident for a purpose and in a manner for which it was designed and manufactured."¹⁰³ This is known as "intended use." Since an aircraft crash is foreseeable, but definitely not intended, manufacturers have no duty under the Act to insure that their aircraft are "crashworthy."¹⁰⁴ Predicating liability on whether the aircraft was being used in a manner intended at the time of the accident completely eliminates the crashworthiness doctrine.

The rule that manufacturers have a duty to construct their products to guard against foreseeable misuse by the consumer of the product was first established in *Larsen v. General Motors Corp.*¹⁰⁵ In *Larsen*, the Eighth Circuit recognized that a manufacturer did not have a duty to build an accident-proof product, but that it does have a duty to use reasonable care in the design of an automobile to avoid subjecting the user to an unreasonable risk in the case of collision.¹⁰⁶ The court rejected the narrow rule that the manufacturer is only responsible for an injury incurred while the automobile is being used in a manner for which it was designed and manufactured.¹⁰⁷

A majority of jurisdictions have adopted the crashworthiness doctrine originally established in *Larsen*.¹⁰⁸ In *Trust Corp. of Montana v. Piper Aircraft Corp.*,¹⁰⁹ a United States district court applied the crashworthiness

¹⁰³ H.R. 1307, *supra* note 12, § 722(b)(1)(C).

¹⁰⁴ This is the rule in strict liability cases. Under the Act a manufacturer is liable for the crashworthiness of the aircraft if the manufacturer's actions constituted negligence. See *supra* notes 35-57 and accompanying text.

¹⁰⁵ 391 F.2d 495 (8th Cir. 1968).

¹⁰⁶ *Id.* at 502.

[U]nder the present state of the art an automobile manufacturer is under no duty to design an accident-proof vehicle or even one that floats on water, but such manufacturer is under a duty to use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision. Collisions with or without fault of the user are clearly foreseeable by the manufacturer and are statistically inevitable.

Id.

¹⁰⁷ *Id.*

¹⁰⁸ See W. TURLEY, *supra* note 67, § 1.15 (list of states that have adopted the crashworthiness doctrine).

doctrine to an aircraft manufacturer.¹¹⁰ The plaintiff alleged that his injuries incurred during the crash were aggravated by the defective design of the aircraft.¹¹¹ The court stated that a manufacturer was not responsible for injuries resulting from the misuse of his product unless such misuse was foreseeable.¹¹² The court went on to say that, like an automobile collision, an aircraft crash was foreseeable.¹¹³

The introduction of "intended use" into strict liability under the Act completely eliminates the "crashworthiness" doctrine except in situations of negligence or express warranty.¹¹⁴ Thus, a plaintiff will be able to recover for injuries caused by the manufacturer's failure in connection with a secondary collision only if he can prove negligence or breach of warranty. Eliminating the "crashworthiness doctrine" in strict liability actions shifts the more onerous burden of proving negligence or breach of an express warranty back to the plaintiff, and thus returning plaintiffs to the same position they were in before the advent of strict liability.

C. *Failure to Provide Adequate Warnings or Instructions*

The Act also provides for recovery by an injured plaintiff when a manufacturer fails to provide adequate warnings or instructions, even after the aircraft is sold, and such failure is the proximate cause of the plaintiff's injury.¹¹⁵ This duty already exists at common law and has

¹⁰⁹ 506 F. Supp. 1093 (D. Mont. 1981), *aff'd on other grounds*, 701 F.2d 85 (9th Cir. 1983).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1094.

¹¹² *Id.* at 1097.

¹¹³ *Id.* at 1098. Misuse of a product, however, is the result of culpable conduct on the part of the plaintiff; therefore, damages should be apportioned accordingly. *Id.*; see also *McGee*, 82 Cal. App. 3d at 1005, 147 Cal. Rptr. at 694 (manufacturer is responsible under strict liability for defective product which causes injury in a secondary accident situation).

¹¹⁴ For a discussion of negligence, see *supra* notes 35-57 and accompanying text; for a discussion of warranty, see also *infra* notes 135-141 and accompanying text.

¹¹⁵ H.R. 1307, *supra* note 12, § 722(b)(2). An injured plaintiff:

been incorporated into the Restatement.¹¹⁶

In *Berkebile v. Brantly Helicopter Corp.*¹¹⁷ the Superior Pennsylvania Supreme Court held the manufacturer of a helicopter liable for its failure to provide adequate warning of a dangerous characteristic.¹¹⁸ The characteristic in question was the difficulty in placing the helicopter in autorotation if the engine failed in climbing flight.¹¹⁹ The flight manual for the helicopter discussed in detail autorotation during cruising flight (the least dangerous situation), but failed to mention the difficulty of autorotation during climbing flight (the most dangerous situation).¹²⁰

The court recognized that the failure to provide adequate warnings could constitute a defective product under

may recover damages from that general aviation manufacturer if -

(A) at the time the product left the control of the manufacturer, the manufacturer —

(i) knew, or in the exercise of reasonable care should have known, about a danger connected with the product that caused the claimant's harm; and

(ii) failed to provide the warnings or instructions that a person exercising reasonable care would have provided with respect to the danger which caused the harm alleged by the claimant, unless those warnings or instructions, if provided, would not have materially affected the conduct of the product user; or

(B) after the product left the control of the general aviation manufacturer, the manufacturer —

(i) knew, or in the exercise of reasonable care should have known, about the danger which caused the claimant's harm; and

(ii) failed to take reasonable steps to provide warnings or instructions, after the manufacture of the product, which would have been provided by a person exercising reasonable care, unless those warnings or instructions, if provided, would not have materially affected the conduct of the product user;

and the failure to provide warnings or instructions described in subparagraph (A) or (B) is a proximate cause of the claimant's harm.

Id.

¹¹⁶ RESTATEMENT (SECOND) OF TORTS § 402A comment j (1964) "In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use." *Id.*; see also *id.* comment h (a product is defective if sold without an adequate warning of any inherent dangers).

¹¹⁷ 462 Pa. 83, 337 A.2d 893 (Pa. 1975).

¹¹⁸ *Id.*, 337 A.2d at 902-903.

¹¹⁹ *Id.*

¹²⁰ *Id.* 337 A.2d at 903.

a strict liability theory.¹²¹ The court emphasized that the "reasonable man" standard does not govern questions regarding what constitutes a necessary instruction or warning.¹²² The sole question for the jury is whether the manufacturer provided the user with adequate instructions and warnings to make the product safe.¹²³

A manufacturer also has a duty to warn consumers of defects that the manufacturer becomes aware of after the sale of the product.¹²⁴ In *Braniff Airways, Inc. v. Curtiss-Wright Corp.*,¹²⁵ an aircraft manufacturer was held liable for a crash resulting from engine difficulties.¹²⁶ The evidence showed that the manufacturer was aware of the problem before the accident occurred, but failed to take any action to remedy the problem.¹²⁷ The court held that the manufacturer had a duty to correct the problem, if feasible, or if not feasible, at least to provide the consumer with adequate warnings.¹²⁸

Presently, actions for failure to warn may be brought under either a negligence or strict products liability theory.¹²⁹ Failure to warn cases brought under a negligence

¹²¹ *Id.* "A 'defective condition' is not limited to defects in design or manufacture. . . . A seller must give such warning and instructions as are required to inform the user or consumer of the possible risks and inherent limitations of his product. *Id.* at 902 (citations omitted).

¹²² *Id.*

¹²³ *Id.* In determining whether the instructions or warnings are adequate, "[t]he jury should view the relative degrees of danger associated with use of the product since a greater degree of danger requires a greater degree of protection." *Id.*

¹²⁴ *DeVito v. United Airlines*, 98 F. Supp. 88 (E.D.N.Y. 1951) (failure to warn users of potential carbon dioxide hazard after aircraft was in use); *see also* *Walton v. Avco Corp.*, 383 Pa. Super. 518, 557 A.2d 372 (1989) (failure to warn helicopter users of an engine design defect discovered after sale).

¹²⁵ 411 F.2d 451 (2d Cir.), *cert. denied*, 396 U.S. 959 (1969).

¹²⁶ *Id.* at 452.

¹²⁷ *Id.* at 453.

¹²⁸ *Id.*

It is clear that after such a product has been sold and dangerous defects in design have come to the manufacturer's attention, the manufacturer has a duty either to remedy these or, if complete remedy is not feasible, at least to give users adequate warnings and instructions concerning methods for minimizing the danger.

Id.

¹²⁹ *See id.* (failure to warn under a negligence theory); *Berkebile*, 462 Pa. at 83, 337 A.2d at 893 (failure to warn constitutes a defective product under a strict

theory impose a reasonableness standard for a manufacturer's failure to warn.¹³⁰ Courts do not agree on whether a failure to warn under a strict liability theory imposes this same reasonableness standard.¹³¹ The Act settles the dispute by imposing a reasonableness standard on a manufacturer's failure to warn.¹³² Thus, the failure of a manufacturer to warn of a dangerous condition of its product, under the Act, will be judged under a reasonableness standard. If a manufacturer is unaware of any danger, and reasonably should not be aware, the manufacturer will not be responsible for any harm created by its failure to provide an adequate warning.

The Act also provides a defense to a manufacturer if it is shown that the warning or instruction would not have altered the conduct of the product user.¹³³ If a manufacturer can show that a warning or instruction would have been ignored, the plaintiff cannot hold the manufacturer liable for its failure to warn.¹³⁴

D. *Warranty*

Finally, the Act establishes liability for the breach of express warranties.¹³⁵ Section 2-313 of the Uniform Com-

product liability theory); *see also* RESTATEMENT (SECOND) OF TORTS § 388 (1964) (negligent failure to warn); RESTATEMENT (SECOND) OF TORTS § 402A comments j, h (1964) (failure to warn constitutes a defective product).

¹³⁰ *Nesselrode v. Executive Beechcraft*, 707 S.W.2d 371, 382-83 (Mo. 1986); *see* RESTATEMENT (SECOND) OF TORTS § 388 (1964).

¹³¹ *See, e.g., Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980) (reasonableness standard applied under strict liability for failure to warn); *Berkebile*, 462 Pa. at 83, 337 A.2d 893 (reasonableness standard denied under strict liability for failure to warn).

¹³² The pertinent provision is quoted *supra* note 115.

¹³³ *See supra* note 115.

¹³⁴ A defendant is hard pressed to show that warnings or instructions would have been ignored by the user of the product.

¹³⁵ H.R. 1307, *supra* note 12, § 722(b)(3).

Any person claiming damages for harm arising out of a general aviation accident may bring an action for damages against a general aviation manufacturer of a product and may recover damages from that general aviation manufacturer if —

(A) the manufacturer made an express warranty with respect to the product;

mercial Code (U.C.C.) governs the creation of express warranties.¹³⁶ Section 2-313 provides that express warranties are created in three different ways: (1) any affirmation of fact or promise made by the seller to the buyer relating to the goods which becomes part of the basis for the bargain; (2) any description of the goods which becomes part of the basis for the bargain; and (3) any sample or model of the goods which becomes part of the basis for the bargain.¹³⁷ An express warranty does not have to be created by contract; it may arise from an advertisement or brochure.¹³⁸

Although the Act does not change existing law as it relates to express warranties, it does preclude recovery under an implied warranty. Presently, the U.C.C. recognizes implied warranties in section 2-314 (merchantability) and section 2-315 (fitness for a specific purpose).¹³⁹ The use of a warranty theory does not require the plaintiff to show that the manufacturer's actions were negligent or that the defective product was unreasonably dangerous. The plaintiff merely has to show that

(B) the warranty relates to that aspect of the product which caused the harm;

(C) the product failed to conform to the warranty; and

(D) the failure of the product to conform to the warranty is a proximate cause of the claimant's harm.

Id.

¹³⁶ U.C.C. § 2-313 (1988). Section 2-313 has been adopted in all states except Louisiana.

¹³⁷ *Id.*

¹³⁸ *Westric Battery Co. v. Standard Elec. Co.*, 482 F.2d 1307 (10th Cir. 1973) (advertising materials, trade publications, and technical publications regarding quality are part of warranty); *Select Pork, Inc. v. Babcock Swine, Inc.*, 640 F.2d 147 (8th Cir. 1981) (description in brochure becomes part of warranty).

¹³⁹ U.C.C. §§ 2-314, 2-315 (1988) "Unless excluded or modified . . . a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." *Id.* § 2-314(1). In order to be merchantable, among other things, the goods must be fit for the ordinary purpose for which they are used. *Id.* § 2-324(2)(c)

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose.

U.C.C. § 2-315 (1988).

the product was not fit for its intended use.¹⁴⁰ This eases the plaintiff's burden of proof. Undoubtedly, the elimination of implied warranties will create at least a small ripple on the aviation liability front.¹⁴¹

III. OTHER PROVISIONS

A. *Airworthiness Directives*

The Act provides an absolute defense for manufacturers if an airworthiness directive¹⁴² has been issued, and if by complying with the directive, the defect would have been corrected prior to any injury.¹⁴³ Airworthiness directives are issued by the Federal Aviation Administration (FAA) when it determines that an unsafe condition exists.¹⁴⁴ An aircraft is allowed to operate only if it is in compliance with all airworthiness directives.¹⁴⁵

Presently, violation of an airworthiness directive by a plaintiff may constitute negligence per se and thus, in those jurisdictions which treat contributory negligence as a complete bar to recovery, violation of an airworthiness directive would preclude any recovery for the plaintiff.¹⁴⁶

¹⁴⁰ Salt River Project Agric. Improvement and Power Dist. v. Westinghouse Elec., 143 Ariz. 368, 694 P.2d 198, 206-07 (Ariz. 1984).

¹⁴¹ See Krause v. Sud-Aviation, Societe Nationale de Constructions Aeronautiques, 301 F. Supp. 513 (S.D.N.Y. 1968) (implied warranty that product will not be harmful under ordinary use), *aff'd on other grounds*, 413 F.2d 428 (2d Cir. 1969); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (implied warranty of fitness of airplane for contemplated use).

¹⁴² The senate bill includes service bulletins issued by the manufacturer. S. 640, *supra* note 12, § 5(c).

¹⁴³ H.R. 1307, *supra* note 12, § 722(c).

[A] general aviation manufacturer shall not be liable if such manufacturer proves, by a preponderance of the evidence, that

(1) the defective condition could have been corrected by compliance with action described in an airworthiness directive issued by the Administrator; and

(2) such directive was issued at a reasonable time before the date of the accident and after the product left the control of the general aviation manufacturer.

Id.

¹⁴⁴ 49 U.S.C. app. § 1421(a) (1988); 14 C.F.R. § 39.3 (1990).

¹⁴⁵ 14 C.F.R. § 39.3.

¹⁴⁶ See Fisher v. Bell Helicopter Co., 403 F. Supp. 1165 (D.D.C. 1975) (failure

In jurisdictions employing comparative responsibility, the act of violation is merely a factor when apportioning fault between the parties. Somewhat inconsistently, the Act treats the violation of an airworthiness directive as negligence per se under a contributory negligence system, completely denying recovery to a person operating an aircraft in violation of an airworthiness directive. This provides a huge escape for manufacturers. Completely denying recovery to a plaintiff operating an aircraft in violation of an airworthiness directive is inconsistent with the Act's comparative responsibility provisions which mandate the use of comparative responsibility in all other situations.¹⁴⁷

B. Comparative Responsibility

The Act establishes the use of comparative responsibility in all general aviation accident cases.¹⁴⁸ Comparative responsibility involves the apportionment of liability and damages between the parties to the suit.¹⁴⁹ Under a pure comparative responsibility system, a plaintiff is able to recover from a defendant the defendant's share of liability regardless of the plaintiff's share of responsibility.¹⁵⁰ Under a modified comparative responsibility system, if the fault attributable to the plaintiff exceeds a certain percentage, the plaintiff is denied any recovery.¹⁵¹ The Act

by owner to follow requirements of airworthiness directive precluded owner's recovery from manufacturer for defective product). *But cf.* Beck by Chain v. Thompson, 818 F.2d 1204 (5th Cir. 1987) (violation of airworthiness directive was not negligence per se in an action against the violator, when the purpose of the airworthiness directive was to inform the pilot of a certain condition of which he was already aware).

¹⁴⁷ See *infra* notes 148-162 and accompanying text.

¹⁴⁸ H.R. 1307, *supra* note 12, § 723(a). "All actions governed by this subtitle shall be governed by the principles of comparative responsibility." *Id.*

¹⁴⁹ Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 424-26 (Tex. 1984).

¹⁵⁰ *Id.* at 428-29. Thus, under a pure system, if the plaintiff were 99% at fault, he could still recover from the defendant the 1% the defendant was at fault. *Id.*

¹⁵¹ *Id.* Thus, if the jurisdiction has adopted a modified system with a threshold of 50%, and the plaintiff's fault is 50% or greater, the plaintiff will recover nothing. *Id.*

adopts a pure comparative system.¹⁵² Most jurisdictions have adopted a modified system.¹⁵³

A few jurisdictions continue to follow the rule of contributory negligence.¹⁵⁴ The problem with contributory negligence is that it is an all or nothing approach. If the plaintiff is the least bit contributorily negligent, he recovers nothing.¹⁵⁵ Most jurisdictions recognize the inequities of denying recovery to a plaintiff that is only slightly negligent when the defendant is responsible for the remaining fault either through negligence, strict liability, or warranty. Other jurisdictions recognize comparative responsibility as a defense, but do not allow its use in strict liability cases.¹⁵⁶ Still other jurisdictions see no theoretical problem with applying comparative responsibility in strict liability cases.¹⁵⁷

In *Butuad v. Suburban Marine & Sporting Goods, Inc.*,¹⁵⁸ the Alaska Supreme Court applied comparative responsibility to a strict liability suit.¹⁵⁹ The court did not interpret strict liability as being absolute liability, and thus refused to hold a manufacturer an "insurer of his product with respect to all harm generated by its use."¹⁶⁰ The court felt that in situations where the defendant is responsible

¹⁵² H.R. 1307, *supra* note 12, § 723(a). "Comparative responsibility attributed to the claimant's conduct shall not bar recovery in such an action, but shall reduce any damages awarded to the claimant in an amount proportionate to the responsibility of the claimant." *Id.*

¹⁵³ See W. TURLEY, *supra* note 67, app. C, for a table of states adopting comparative responsibility.

¹⁵⁴ *Marley v. Kirby*, 271 S.C. 122, 245 S.E.2d 604 (1978) (comparative negligence statute is unconstitutional); *Street v. Calvert*, 541 S.W.2d 576 (Tenn. 1976) (Tennessee Supreme Court declines to adopt comparative negligence).

¹⁵⁵ 57A AM. JUR. 2d *Negligence* § 960 (1989).

¹⁵⁶ See, *Melia v. Ford Motor Co.*, 534 F.2d 795 (8th Cir. 1976) (comparative responsibility denied by statute in strict liability cases); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976) (comparative responsibility does not apply in strict product liability actions if the fault of the plaintiff is his failure to discover the defect or guard against it); *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974) (comparative responsibility only applies in negligence actions).

¹⁵⁷ See, e.g., *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975); *Stueve v. American Honda Motors Co.*, 457 F. Supp. 740 (D. Kan. 1978).

¹⁵⁸ 555 P.2d 42 (Alaska 1976).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 45.

for producing a defective product, the plaintiff is nevertheless responsible for his own actions which contributed to the accident.¹⁶¹ The court also saw no violation of the public policy reasons inherent in strict liability by allowing comparative responsibility.¹⁶²

With the passage of the Act, all confusion as to when comparative responsibility applies and when it does not is eliminated. Jurisdictions will no longer have a choice of whether or not to apply it to strict liability cases, or even whether to apply it at all. Comparative responsibility will apply across the board, in cases brought in negligence, strict liability, or warranty, for recovery in general aviation accidents.

C. *Joint and Several Liability*

Another of the more controversial provisions of the Act eliminates joint and several liability between joint tortfeasors.¹⁶³ The only exception is that a general aviation manufacturer of an airframe is jointly and severally liable with a manufacturer of a component installed in the

¹⁶¹ *Id.* at 45-46.

¹⁶² *Id.* at 46. "The manufacturer is still accountable for all the harm from a defective product, except that part caused by the consumer's own conduct." *Id.*; see also *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F. Supp. 598 (D. Idaho 1976) (use of comparative responsibility in a strict liability case).

¹⁶³ H.R. 1307, *supra* note 12, § 723(b)-(c).

(b) . . . Except as provided in subsection (c), a defendant is severally but not jointly liable in an action governed by this subtitle, and the liability of any defendant in any such action shall be determined on the basis of that defendant's proportionate share of responsibility for the claimant's damages.

(c) . . . In an action governed by this subtitle (1) a general aviation manufacturer who is the builder or manufacturer of the airframe of the general aviation aircraft involved is jointly and severally liable for damages for harm caused by a defective system, component, subassembly, or other part of that aircraft that the manufacturer installed or certified as part of the original type design for that aircraft; and (2) a general aviation manufacturer who is the manufacturer of a system or component of the general aviation aircraft involved is jointly and severally liable for damages for harm caused by a defective subassembly or other part of that system or component.

Id. (headings omitted).

aircraft if the harm is caused by the component.¹⁶⁴ Currently, the general rule in most jurisdictions is that joint tortfeasors are jointly and severally liable for any nonapportionable injury to the plaintiff, regardless of whether the defendants acted in concert.¹⁶⁵

The current rule is set out clearly in *Phillips Petroleum Co. v. Hardee*.¹⁶⁶ The plaintiffs were rice farmers who used a creek for irrigating their rice.¹⁶⁷ The defendants were oil companies who allegedly polluted the creek, causing the failure of the plaintiffs' rice crop.¹⁶⁸ The Fifth Circuit held that jury instructions which provided that each defendant must be the sole cause of the injury in order to be liable were improper.¹⁶⁹ The court went on to say that if the harm is incapable of being apportioned, then the joint tortfeasors are jointly and severally liable.¹⁷⁰

Enactment of this provision of the Act will provide much welcome relief to the general aviation industry. No longer will "deep pockets" be fully responsible for the entire judgment if only partially responsible for the injury. In reality the only change from the current law will be in

¹⁶⁴ *Id.*

¹⁶⁵ 74 AM. JUR. 2d *Torts* § 62 (1974); see also RESTATEMENT (SECOND) OF TORTS § 879 (1977) (joint tortfeasors are jointly and severally liable if each is legal cause of harm that can not be apportioned regardless of whether their conduct is concurring or consecutive). But see 74 AM. JUR. 2d *Torts* § 63 (1974) (joint liability not recognized in some jurisdictions); *Mitchell Realty Co. v. City of West Allis*, 184 Wis. 352, 199 N.W. 390 (1924) (joint and several liability between joint tortfeasors only as strictly necessary).

¹⁶⁶ 189 F.2d 205 (5th Cir. 1951).

¹⁶⁷ *Id.* at 206-207.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 211.

¹⁷⁰ *Id.* at 212.

According to the great weight of authority where the concurrent or successive acts or omissions of two or more persons, although acting independently of each other, are in combination, the direct or proximate cause of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury

Id. at 212 (citation omitted). See also *Browne v. McDonnell Douglas Corp.*, 504 F. Supp. 514 (N.D. Cal. 1980) (under California law joint tortfeasors are responsible for entire amount of damages); *Hart v. Cessna Aircraft Co.*, 276 N.W.2d 166 (Minn. 1979) (joint tortfeasors are jointly and severally liable).

situations where a joint tortfeasor is someone other than a manufacturer of a component, such as a pilot or repair service. In situations where the injury is the result of the airframe manufacturer's defect or the component manufacturer's, both will continue to be jointly and severally liable.¹⁷¹

D. *Statutes of Repose*

Another highly controversial change made to existing law by the Act is the adoption of a statute of repose applicable to any general aviation accident.¹⁷² The Act prevents any actions for injuries or harms arising out of a general aviation accident against a general aviation manufacturer if not brought within twelve years from the date of sale or lease of the product.¹⁷³ This provision does not apply, however, to situations where the general aviation manufacturer has expressly warranted that the product life will exceed that provided for in the statute,¹⁷⁴ nor in

¹⁷¹ See *supra* note 164 and accompanying text.

¹⁷² Statutes of repose prevent the creation of a cause of action beyond a specified period of time, unlike a statute of limitation which creates a requirement that the cause of action be pursued within a specified time after it has accrued. Comment, *Statutes of Repose in Products Liability: Death Before Conception?*, 37 Sw. L.J. 665, 666 (1983). H.R. 1307 and S. 640 also provide for a statute of limitation in general aviation accidents of within two years from the general aviation accident. H.R. 1307, *supra* note 12, § 728 and S. 640, *supra* note 12, § 11. Statutes of limitation are beyond the scope of this comment.

¹⁷³ H.R. 1307, *supra* note 12, § 724.

No civil action for damages for harm arising out of a general aviation accident which is brought against a general aviation manufacturer may be brought for harm which is alleged to have been caused by an aircraft or a system, component, subassembly, or other part of an aircraft and which occurs more than -

(1) 12 years from —

(A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer, or

(B) the date of the first delivery of the aircraft to a person engaged in the business of selling or leasing such an aircraft; or

(2) with respect to any system, component, subassembly, or other part which replaced another product in, or which was added to, the aircraft, and which is alleged to have caused the claimant's harm, 12 years from the date of the replacement or addition.

Id. The senate bill provides for a 20 year period. S. 640, *supra* note 12, § 7(a).

¹⁷⁴ H.R. 1307, *supra* note 12, § 724(b).

situations where the manufacturer becomes aware of a defect after the sale of the product and fails to warn the user.¹⁷⁵

Statutes of repose were created in an attempt to deal with the crisis of skyrocketing products liability costs.¹⁷⁶ This otherwise unlimited "tail" of liability has caused manufacturers and insurers to cry foul at their inability to accurately fix the cost of liability to pass along to consumers.¹⁷⁷ Proponents of statutes of repose point out the difficulty in defending an action based on a defect in a product, or on a manufacturer's negligence, when the product was manufactured many years prior to the date of the injury.¹⁷⁸ Evidence crucial to the defense may have long since disappeared.¹⁷⁹ Furthermore, the product may have suffered misuse over the years or may have been modified, making liability more difficult to prove.¹⁸⁰

Opponents of statutes of repose have little sympathy for the proponents' claims of difficulty of a defense when a number of years have elapsed between the time of manufacture and the injury. They point out that the burden of proof in a products liability claim is always on the plaintiff.¹⁸¹ Furthermore, if it is difficult for the manufacturer to go back a number of years to defend a product, it is just as difficult for the plaintiff to go back as many years to prove the manufacturer's negligence or the existence of a defective product at the time of sale.¹⁸² Opponents contend that it is even more difficult for the plaintiff to overcome this time barrier because of the presumption that if the product has been performing safely for a number of years, then it was not defective at the time it was sold.¹⁸³

¹⁷⁵ *Id.* § 724(c).

¹⁷⁶ Comment, *supra* note 172, at 675.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 676.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ W. TURLEY, *supra* note 67, § 5.28.

¹⁸² *Id.*

¹⁸³ *Id.*

Opponents of statutes of repose also point out the apparent inconsistency between allowing statutes of repose to prevent actions from arising and the recognition of the doctrine of strict products liability.¹⁸⁴ The inconsistency arises from the policy considerations of strict liability. Specifically, strict products liability was created to provide recovery to an injured plaintiff without the showing of culpable conduct on the part of the manufacturer.¹⁸⁵ The theory is that the manufacturer is in a better position to bear the cost by passing it along to the consumer in the form of increased prices.¹⁸⁶ Statutes of repose, however, place this cost on the person least able to afford it, the injured plaintiff.¹⁸⁷

Several states have already adopted various types of statutes of repose for product liability actions.¹⁸⁸ Some statutes apply only to specific types of actions.¹⁸⁹ Some merely create a rebuttable presumption that the useful life of the product has expired,¹⁹⁰ and some are specifically excluded from application in certain circumstances.¹⁹¹

Since inception, statutes of repose have come under fire on three different constitutional theories: equal protection, due process, and right of access to the courts.¹⁹²

¹⁸⁴ See *supra* notes 58-114 and accompanying text for a discussion of strict products liability.

¹⁸⁵ See *supra* notes 58-114 and accompanying text for a discussion of strict products liability.

¹⁸⁶ RESTATEMENT (SECOND) OF TORTS § 402A, comment c (1964). "[P]ublic policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained." *Id.*

¹⁸⁷ See *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 673 (Utah 1985).

¹⁸⁸ See W. TURLEY, *supra* note 67, app. G (table of states that have adopted some form of a statute of repose applicable to products liability). Many states have adopted other forms of statutes of repose applying to either architects and engineers or to medical malpractice cases. See generally McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579 (1981).

¹⁸⁹ See, e.g., ILL. ANN. STAT. ch. 110, para. 13-213(b) (Smith-Hurd 1984) (applies only to actions in strict liability); IND. CODE ANN. § 33-1-1.5-5 (Burns Supp. 1990) (only applies to actions in strict liability or negligence).

¹⁹⁰ See, e.g., IDAHO CODE § 6-1403(2) (1990).

¹⁹¹ See, e.g., TENN. CODE ANN. § 29-28-103(b) (1980) (statute does not apply to asbestos claims).

¹⁹² Comment, *supra* note 172, at 684; see also McGovern, *supra* note 188, at 579

The best opportunity to challenge a statute of repose is under the guaranteed right of access to the courts found in several state constitutions.¹⁹³ These state provisions generally guarantee a plaintiff access to the courts of his state.¹⁹⁴

In *Berry v. Beech Aircraft Corp.*,¹⁹⁵ the Supreme Court of Utah invalidated a statute of repose on the grounds that it violated the provision of the Utah Constitution that provided that all courts were open to all injured parties.¹⁹⁶ The action in *Berry* was brought in connection with the crash of a twenty-three year old aircraft.¹⁹⁷ The court held that Utah's open court provision restricted the legislature's right to modify common law remedies without providing for alternative remedies.¹⁹⁸ With a clear social or economic evil present, the legislature can eliminate a common law remedy only if the elimination is neither arbitrary nor unreasonable.¹⁹⁹ The court failed to find a clear social or economic evil eliminated by the statute of repose and thus ruled that it was unconstitutional.²⁰⁰

Other state courts have ruled that statutes of repose do not violate state constitutional provisions guaranteeing access to the courts.²⁰¹ In *Dague v. Piper Aircraft Corp.*,²⁰²

(discussion of the various policy and constitutional issues surrounding statutes of repose).

¹⁹³ Comment, *supra* note 172, at 686-87.

¹⁹⁴ *Id.* at 687.

¹⁹⁵ 717 P.2d 670 (Utah 1985).

¹⁹⁶ *Id.* at 683. The Utah Constitution provides that:

[a]ll courts shall be open, and every person, for an injury done to him in his person, property, or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party.

UTAH CONST. art. I, § 11.

¹⁹⁷ *Berry*, 717 P.2d at 672. The Utah statute at issue prevented an action for any product defects that did not result in injury within six years of the initial purchase for use or within ten years of manufacture. *Id.* at 673.

¹⁹⁸ *Id.* at 680.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 683.

²⁰¹ *Dague v. Piper Aircraft Corp.*, 275 Ind. 520, 418 N.E.2d 207 (1981); Thorn-

the Indiana Supreme Court held that a statute of repose was constitutional even though the Indiana Constitution had an open court provision almost identical to the one found in *Berry*.²⁰³ The action in *Dague* was filed in connection with the crash of a thirteen year old aircraft.²⁰⁴ The court held that the plaintiff's cause of action was prohibited by a statute of repose requiring actions for product liability be brought within ten years of the date of the delivery of the product to the original consumer.²⁰⁵ Unlike the *Berry* court, the *Dague* court broadly construed the powers of the legislature, finding that the legislature could eliminate or modify common law rights or remedies.²⁰⁶ Furthermore, the court held that if the legislature took away a common law right or remedy, there was no obligation to provide an alternative remedy.²⁰⁷

E. Punitive Damages

The Act provides for punitive damages in situations where the harm incurred by the injured party directly re-

ton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E.2d 522 (1981) (statute of repose also held not to violate due process or equal protection).

²⁰³ 275 Ind. 520, 418 N.E.2d 207 (1981).

²⁰⁵ *Id.* at 520, 418 N.E.2d at 213. The open court provision of the Indiana Constitution states that "[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law." IND. CONST. art. I, § 12.

²⁰⁴ *Dague*, 275 Ind. at 520, 418 N.E.2d at 209.

²⁰⁵ *Id.* at 520, 418 N.E.2d at 211. The statute in question mandates the following:

[a]ny product liability action must be commenced within two years after the cause of action accrues or within ten years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight years but not more than ten years after the initial delivery, the action may be commenced at any time within two years after the cause of action accrues.

IND. CODE ANN. § 33-1-1.5-5 (Burns Supp. 1989). The Indiana Supreme Court decided that the legislature intended the "or" present within the phrase "action accrues or within ten years" to be an "and." *Dague*, 275 Ind. at 520, 418 N.E.2d at 211.

²⁰⁶ *Id.* at 520, 418 N.E.2d at 213. "Both this Court and the United States Supreme Court have upheld the right of states to abolish or modify the common law." *Id.* (quoting *Sidle v. Majors*, 264 Ind. 206, 209, 341 N.E.2d 763, 766 (1976)).

²⁰⁷ *Id.*

sults from conduct manifesting a conscious and flagrant indifference to the safety of those persons who might be harmed by the use of the general aviation aircraft.²⁰⁸ In order to recover punitive damages, the Act further provides that the claimant must meet the burden of proof with clear and convincing evidence.²⁰⁹

Presently, most states permit the recovery of punitive damages in situations where the conduct of the party causing an injury is more reprehensible than ordinary tortious conduct.²¹⁰ Some states restrict the use of punitive damages to those situations expressly authorized by statute.²¹¹ Punitive damages are intended to punish the wrongdoer for its reprehensible behavior and further to deter the wrongdoer and others from future harmful conduct.²¹²

Various standards are utilized by different states to determine whether the conduct of the party is sufficient to award punitive damages.²¹³ Some standards are statuto-

²⁰⁸ H.R. 1307, *supra* note 12, § 727(a).

²⁰⁹ *Id.*

²¹⁰ DAMAGES IN TORT ACTIONS, § 40.21 at 40-76 (1989); *see also* Kritser v. Beech Aircraft Corp., 479 F.2d 1089 (5th Cir. 1973) (punitive damages allowable in wrongful death action under Texas law against aircraft manufacturer); Piper Aircraft Corp. v. Coulter, 426 So. 2d 1108 (Fla. Dist. Ct. App. 1983) (punitive damages allowable in a products liability claim against an aircraft manufacturer); Walter v. Cessna Aircraft Co., 121 Wis. 2d 221, 358 N.W.2d 816 (Wis. Ct. App. 1984) (punitive damages allowable in strict liability or negligence claim against aircraft manufacturer for design defect); RESTATEMENT (SECOND) OF TORTS § 908 (1977); J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE, § 4.19 at 40 (Supp. 1990) (summary of states' positions on allowance of punitive damages).

²¹¹ *See, e.g.*, N.H. REV. STAT. ANN. § 507:16 (Supp. 1989) (no punitive damages unless otherwise allowed by statute); Boott Mills v. Boston & M. R. R., 218 Mass. 582, 106 N.E. 680 (1914) (punitive damages only awarded by express statute); Barr v. Interbay Citizens Bank of Tampa, 96 Wash. 2d 409, 635 P.2d 441 (1981) (punitive damages are not allowed unless expressly authorized by legislature).

²¹² RESTATEMENT (SECOND) OF TORTS § 908(1) (1977); *see also* Chrysler Corp. v. Wolmer, 499 So. 2d 823 (Fla. 1986) (punitive damages are imposed to punish wrongdoer and to deter others from similar activity); Snowden v. Osborne, 269 So. 2d 858 (Miss. 1972) (punitive damages are granted to punish wrongdoer and to set an example so that others may be deterred from committing similar offenses); O'Donnell v. K-Mart Corp., 100 A.D.2d 488, 474 N.Y.S.2d 344 (1984) (purpose of punitive damages is to punish and deter a defendant and to deter others from committing similar acts).

²¹³ The *Restatement* allows punitive damages "for conduct that is outrageous, be-

rily imposed.²¹⁴ Others are imposed by the courts.²¹⁵ The Act imposes the standard of "a conscious and flagrant indifference to the safety of those persons who might be harmed by the use of the general aviation aircraft" in order to recover punitive damages.²¹⁶

The legislative histories of the Act and S. 640 shed little light on whether the standard of "a conscious and flagrant indifference to the safety" is the same as those standards currently in use in the different states.²¹⁷ The standards generally in current use include fraud, ill will, maliciousness, wantonness, recklessness, oppressiveness, and the reckless disregard for the rights of others.²¹⁸ Mere negligence, however, was not contemplated by the drafters as providing grounds for recovery of punitive damages.²¹⁹

cause of the defendant's evil motive or his reckless indifference to the rights of others." RESTATEMENT (SECOND) OF TORTS § 908(2) (1977).

²¹⁴ See, e.g., ALA. CODE. § 6-11-20(a) (Supp. 1990) (recovery of punitive damages when the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice); CAL. CIV. CODE § 3295 (West Supp. 1988) (recovery of punitive damages when the defendant is guilty of oppression, fraud or malice); OR. REV. STAT. § 30.925 (1989) (punitive damages recoverable if the defendant has shown wanton disregard for the health, safety and welfare of others); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon Supp. 1990) (recovery of exemplary damages when injury results from fraud, malice, or gross negligence).

²¹⁵ See, e.g., *Smith v. Chapman*, 115 Ariz. 211, 564 P.2d 900 (1977) (punitive damages awarded for acts done with bad motive or with reckless indifference to the rights of others); *Wagman v. Lee*, 457 A.2d 401 (D.C. 1983) (punitive damages may be awarded when the defendant's conduct is accompanied by fraud, ill will, recklessness, wantonness, oppressiveness, willful disregard for the plaintiff's rights or other circumstances tending to aggravate), *cert. denied*, 464 U.S. 849 (1983); *Hall v. American Airlines*, 1 Haw. App. 258, 617 P.2d 1230 (1980) (defendant's wrongful act must be done willfully, wantonly or maliciously, or characterized by some aggravating circumstances to subject it to punitive damages); *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382 (Ky. 1985) (punitive damages are awarded for defendant's outrageous conduct).

²¹⁶ H.R. 1307, *supra* note 12, § 727(a).

²¹⁷ S. 640 actually provides for a standard of "conscious, flagrant indifference . . ." S. 640, *supra* note 12, § 10(a). The replacement of "and" in H.R. 1307 with a comma in S. 640 does not appear to create a different interpretation of the provision between the two bills. The committee report on H.R. 1307 from the House Committee on Public Works and Transportation does not provide any assistance in the interpretation of the standard.

²¹⁸ See sources cited *supra* notes 213-215.

²¹⁹ S. REP. NO. 223, 101st Cong., 1st Sess. 13 (1989).

Since the standards in current use are often defined in a manner similar to the standard found in the Act, the imposition of "a conscious and flagrant indifference" standard should cause no change to the present substantive law.²²⁰

The imposition in the Act of a clear and convincing burden of proof standard for imposing punitive damages will change the law in some jurisdictions. Many states already employ a clear and convincing standard for imposing punitive damages.²²¹ The rationale behind such a standard is the relationship between punitive damages and criminal punishment.²²² Other states, however, continue to use the general civil standard of a preponderance of the evidence as the burden of proof required to recover punitive damages.²²³

The Act also addresses the admission of financial evidence in order to determine the amount of punitive damages necessary to punish the wrongdoer. Specifically, the Act provides that financial information regarding the defendant cannot be admitted until the claimant establishes that it can present evidence establishing *prima facie* proof of conduct allowing the recovery of punitive damages.²²⁴

²²⁰ See CAL. CIV. CODE § 3294(c)(1) (West Supp. 1990) (malice includes conduct carried on by the defendant which is a willful and conscious disregard of the rights and safety of others); TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon 1990) (gross negligence includes an actual conscious indifference to the rights, safety, or welfare of the person affected).

²²¹ See, e.g., ALA. CODE § 6-11-20(a) (Supp. 1990); CAL. CIV. CODE § 3294(a) (West Supp. 1990); KAN. CIV. PROC. CODE ANN. § 60-3701(c) (Vernon Supp. 1989); MONT. CODE ANN. § 27-1-221(5) (1989); OR. REV. STAT. § 30.925(1) (1988); see also *Deshmukh v. Cook*, 630 F. Supp. 956, 960-61 (S.D.N.Y. 1986); *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 490, 733 P.2d 1073, 1088, *cert. denied*, 484 U.S. 874 (1987); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 260, 294 N.W.2d 437, 457 (1980).

²²² See, e.g., *Deshmukh*, 630 F. Supp. at 960-61; *Hawkins*, 152 Ariz. at 490, 733 P.2d at 1087; *Wangen*, 97 Wis. 2d at 260, 294 N.W.2d at 457.

²²³ See, e.g., *Holmes v. Hollingsworth*, 234 Ark. 347, 352 S.W.2d 96 (1961); *Johnson v. Stackhouse Oldsmobile, Inc.*, 27 Ohio St. 2d 140, 271 N.E.2d 782 (1971); *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978).

²²⁴ H.R. 1307, *supra* note 12, § 727(b). The Act provides the following: [E]vidence regarding the financial worth of a defendant or the defendant's profits or any other financial evidence relating solely to a claim for punitive damages under this subtitle is not admissible un-

Most states presently allow the admission of financial evidence concerning the defendant for the determination of punitive damages.²²⁵ Some allow the evidence during trial after the claimant has made a *prima facie* showing that the claimant is entitled to punitive damages, while others only allow the admission of the evidence after the defendant has been held responsible for punitive damages.²²⁶

Admitting evidence of the defendant's wealth raises two obvious concerns. First, the evidence may have a prejudicial effect on the trier of fact during the determination of liability and, second, it is an invasion of privacy into what typically are confidential affairs.²²⁷ The drafters of the Act, along with some states, believe that requiring a plaintiff to prove a *prima facie* right to punitive damages prior

less the claimant establishes, before any such evidence is offered, that the claimant can present evidence that will establish *prima facie* proof of conduct manifesting a conscious and flagrant indifference to the safety of those persons who might be harmed by use of the general aviation aircraft involved.

Id. S. 640 also provides that if the harm incurred is death and the applicable state law only provides for punitive damages, then the claimant does not have to meet the requirements of § 10(a) in order to collect punitive damages under state law. S. 640, *supra* note 12, § 10(c).

²²⁵ See, e.g., RESTATEMENT (SECOND) OF TORTS § 908 comment e (1977). But see COLO. REV. STAT. § 13-21-102(6) (1989) (evidence of the income or net worth of a party shall not be admitted to establish the amount of punitive damages).

²²⁶ See, e.g. ALA. CODE § 6-11-23(b) (Supp. 1990) (in all cases where a verdict for punitive damages is awarded, on motion of a party, the court shall hear evidence on the amount of punitive damages including the economic impact on the defendant); CAL. CIV. CODE § 3295(a) (West Supp. 1990) (court may grant the defendant a protective order requiring the claimant to show a *prima facie* case for punitive damages prior to allowing financial information about the defendant into evidence); MONT. CODE ANN. § 27-1-221(7)(a) (1989) (after return of a verdict the jury shall determine the amount of punitive damages taking into consideration the defendant's financial affairs, financial condition and net worth); OR. REV. STAT. § 30.925(2) (1988) (during course of a trial, evidence concerning the defendant's ability to pay shall not be admitted until the claimant establishes a *prima facie* right to recover punitive damages); see also *Gierman v. Toman*, 77 N.J. Super. 18, 185 A.2d 241 (Law Div. 1962) (orderly procedure requires that a *prima facie* right to recover punitive damages must be shown prior to the disclosure of the wealth of the defendant); *Campen v. Stone*, 635 P.2d 1121 (Wyo. 1981) (the jury may hear evidence of the defendant's financial status after they have returned a verdict for punitive damages).

²²⁷ *Campen*, 635 P.2d at 1127-28.

to the admission of evidence concerning the defendant's wealth, protects the defendant against the needless invasion of privacy and prejudice on the part of the trier of fact. This standard, however, does not protect the defendant to the extent that an exclusion until after liability has been found would. Once a plaintiff makes a prima facie case, the defendant still has an opportunity to rebut the plaintiff's case. Under the standard established by the Act, financial evidence is submitted prior to a finding of liability on the part of the defendant, thus impacting the liability decision of the trier of fact and possibly requiring the needless disclosure of private information by the defendant. The standard established by the Act eases the burden on plaintiffs by making it easier to prove punitive damages by allowing potentially prejudicial evidence to reach the trier of fact prior to a decision on liability. The burden on the defendant is also increased to the extent the defendant will have to furnish confidential financial information prior to any finding of liability for punitive damages.

F. *Jurisdiction and Venue*

The Act provides for concurrent federal and state subject matter jurisdiction over general aviation accidents, regardless of the amount in controversy.²²⁸ Presently a federal court can try a general aviation accident case only if the parties in the action are residents of different states and the amount in controversy exceeds \$50,000.²²⁹ None of the plaintiffs and defendants (if more than one) may be

²²⁸ H.R. 1307, *supra* note 12, § 729(a). "The district courts of the United States, concurrently with the State courts, shall have original jurisdiction, without regard to the amount in controversy, in all actions governed by section 722 [general provisions relating to liability] and in all actions for indemnity or contribution described in section 723(d) of this subtitle." *Id.*

²²⁹ 28 U.S.C. § 1332(a) (1988). "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$50,000, exclusive of interest and costs, and is between citizens of different States; . . ." *Id.* Other statutes granting jurisdiction to federal courts are 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1333 (admiralty and prize jurisdiction).

residents of the same state.²³⁰ A corporation is considered a resident of a state if it is incorporated in the state or its principal place of business is located in the state.²³¹ Due to the nature of aircraft accidents and the subsequent suits, the diversity requirement is probably met in most cases brought currently; thus, this change will likely have little impact on the current system.²³²

The Act also allows removal of an action from a state court to a federal district court at the discretion of any defendant.²³³ This provision mirrors the present law.²³⁴ Although not changing present law, the combination of this provision with the provision that federal district courts will always have original jurisdiction provides the

²³⁰ *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

²³¹ 28 U.S.C. § 1332(c)(1). "[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business" *Id.* Two approaches are used to determine a corporation's principal place of business. *See Kelly v. United States Steel Corp.*, 284 F.2d 850 (3d Cir. 1960) (principal place of business of a corporation is the location where the primary day to day activities of the corporation take place); *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862 (S.D.N.Y. 1959) (principal place of business of a corporation is the nerve center of the corporation, where the officers and directors coordinate and direct the activities of the corporation).

²³² Since aircraft manufacturers are headquartered and incorporated in relatively few states and aircraft by nature are distributed widely, the odds are that in any given accident, diversity will exist between the plaintiff and the defendants. In order for a state court, or a federal court within a particular state, to exercise personal jurisdiction over a nonresident defendant, the nonresident must have sufficient contacts within the jurisdiction. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The Act has no effect on the requirements of personal jurisdiction.

²³³ H.R. 1307, *supra* note 12, § 729(b).

A civil action which is brought in a State court may be removed to the district court of the United States for the district embracing the place where the action is pending, without the consent of any other party and without regard to the amount in controversy, by any defendant against whom a claim in the action is asserted for damages for harm arising out of a general aviation accident.

Id.

²³⁴ *See* 28 U.S.C. § 1441.

[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Id. § 1441(a).

defendant with unlimited control over whether the case is tried in state court or federal court. Any advantages which might exist in state court for the plaintiff are easily circumvented by the defendant's request for removal, which the judge has no choice but to allow.²³⁵

The Act also provides federal courts with pendent jurisdiction to hear state law claims arising out of a general aviation accident if a "substantial question of fact" is common to both the state and federal claims.²³⁶ Present law gives federal courts pendent jurisdiction to decide state law claims if the state and federal claims arise out of a "common nucleus of operative fact."²³⁷ The present standard and the one proposed by the Act appear to be the same.

Like pendent jurisdiction, the provisions of the Act relating to venue are essentially the same as those that currently exist. Under the Act, venue will exist in a district court if the claim arose within the district, or any plaintiff or defendant resides within the district.²³⁸ A corporation is deemed a resident of any state in which it is incorporated, licensed to do business, or is actually doing business.²³⁹ Furthermore, an action can be transferred to any other district, upon motion of any party or on the court's motion, "for the convenience of parties and witnesses in the interest of justice."²⁴⁰ Present law provides for the

²³⁵ See W. TURLEY, *supra* note 67, § 10.01 (general discussion of the advantages and disadvantages of bringing suit in federal court versus those found by bringing suit in state court).

²³⁶ H.R. 1307 *supra* note 12, § 729(c).

In any case commenced in or removed to a district court under subsection (a) or (b), the court shall have jurisdiction to determine all claims under State law that arise out of the same general aviation accident if a substantial question of fact is common to the claims under State law and to the Federal claim, defense, or counterclaim.

Id.

²³⁷ *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

²³⁸ H.R. 1307 *supra* note 12, § 729(d). "A civil action in which the district courts have jurisdiction under subsection (a) may be brought only in a district in which the accident giving rise to the claim occurred; or any plaintiff or defendant resides." *Id.*

²³⁹ *Id.* § 729(d)(3).

²⁴⁰ *Id.* § 729(d)(2).

same result.²⁴¹

IV. CONCLUSION

No one involved in the general aviation industry would argue that a plaintiff injured due to the fault of a general aviation manufacturer should not be compensated. The Act does not prevent recovery by deserving plaintiffs. Since the advent of strict liability, the balance on the scales of liability has been disproportionately on the side of the plaintiff with an obvious effect on the general aviation industry. The Act merely shifts this balance toward equilibrium.

The Act does not prevent recovery in a general aviation accident from a party that is liable under current law.²⁴² Nor does the Act place a limit on the amount of damages a plaintiff may be awarded, or on the amount of attorneys' fees that may be awarded. The Act merely attempts to limit the liability of a general aviation manufacturer to those situations where, through fault of the manufacturer, its product causes an injury. By limiting this liability to a fixed period and a fixed number of situations, insurers can accurately predict the liability cost of a product, thus reducing the cost of insurance. By reducing the cost of insurance, the cost of aircraft will decline, with the resulting impact felt in all phases of the economy.

The policy reasons for strict liability are twofold: (1) to compensate the injured, and (2) to place the burden of risk on those who can best protect against it.²⁴³ Nothing in the Act is designed to prevent the compensation of deserving, injured plaintiffs. Nor does the Act shift the entire burden of risk onto the plaintiff. The general aviation manufacturer still has to insure that it has not negligently designed or manufactured its product and that it is using state of the art technology in its manufacture and design

²⁴¹ 28 U.S.C. §§ 1391(a), (c), 1404(a).

²⁴² See *supra* notes 14-24 and accompanying text.

²⁴³ See *supra* notes 58-114 and accompanying text.

of the product.²⁴⁴

Furthermore, the users of general aviation products arguably should absorb some of the risks associated with flying themselves, through insurance or otherwise. The typical user of general aviation products is generally not the poor defenseless consumer needing the overabundance of protection provided by the current state of liability laws. Flying is not completely risk-free, and those participating in it should be forced to bear some of the risk of their participation.

Also, under the Act the manufacturer continues to have an incentive to design and manufacture a safe product. If the manufacturer fails to do so, the laws of the marketplace will come into play and no one will be willing to purchase an unsafe aircraft. Furthermore, the manufacturer is constrained by the rules and regulations of the FAA. The general aviation industry is one of the most highly regulated industries in the United States. Although FAA guidelines are only minimums, they are designed to insure a safe aircraft.

The policy arguments favoring the consumer of general aviation products are on one side of the scale while on the other side are the prohibitive liability costs and the impact they have on the general aviation industry. Although Congress' inaction prevented the passage of the Act during the 101st session, undoubtedly the aviation industry will try again during the 102nd Congress. Congress will then have another chance to bring stability and hope to an industry still mired in the recession of the 1970s.

²⁴⁴ See *supra* notes 35-141 and accompanying text.

Casenotes and Statute Notes

